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# In the Supreme Court of the United States

OCTOBER TERM, 1981

SHEILA RENDELL-BAKER,
PETITIONER,

v.

SANDRA KOHN, ET AL.,
RESPONDENTS,

WAYNE KLUG, ET AL.,
PETITIONERS,

v.

NEW PERSPECTIVES SCHOOL, INC., ET AL.,
RESPONDENTS.

On Writ of Certiorari to
The United States Court of Appeals for the First Circuit

## REPLY BRIEF FOR PETITIONERS

ZACHARY R. KAROL*
S. ELAINE RENFRO
RICHARD J. YURKO
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110
(617) 357-9300

ALAN JAY ROM
Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association
294 Washington Street, Suite #506
Boston, Massachusetts 02108

JOHN REINSTEIN
Civil Liberties Union of Massachusetts Foundation, Inc.
47 Winter Street, 6th Floor
Boston, Massachusetts 02108
*Counsel for Petitioners*

*Counsel of Record

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## REPLY BRIEF FOR PETITIONERS

### Additional Regulatory Provisions

The following additional regulatory provisions are set out in the Appendix to this reply brief:

> 603 Code of Massachusetts Regulations, Section 7, Paragraphs 7.04(1), (2), (40), (41)(a)&(f), (42)(a)&(f), (43)(a)&(f), (44)(a)&(f), and (45)(a)&(f) [effective September 1, 1982];
>
> 603 Code of Massachusetts Regulations, Section 28, Paragraphs 322.0, 322.1, 504.4(b), 700.1-700.4, 802.0-802.19, 1000.0-1000.6 (1979).

### Argument

This reply brief is filed by petitioners to address selected points raised by respondents New Perspectives School, Inc. [the "School"] and its directors [collectively, the "School respondents"], respondents Bellotti and Highgas [collectively, the "State respondents"], and the Massachusetts Association of 766 Approved Private Schools, Inc. [the "Association"], *amicus curiae*.[1]

[1] In addition to the abbreviations to the various appendices and records set forth in Petitioners' Brief at 3 n.4, the following abbreviations shall be used in this reply brief:

| | |
|---|---|
| Appendix to Reply Brief (herein) | R.A. |
| Brief of the School Respondents | School Brief |
| Brief of the State Respondents | State Brief |
| Brief of the Association | Association Brief |

## I. The School was Performing the Sovereign Function of Providing Public Education.

The School respondents, the Association, and, to a lesser extent, the State respondents appear to make two closely-related arguments in response to petitioners' argument that the provision of special education under Chapter 766 is a public function. First, they argue that the function of providing education to children with special educational needs is constitutionally distinguishable from the function of providing education to children without such needs. Second, they argue that providing public education even to children without special needs is not a sovereign function because the function of providing education was not traditionally exclusively reserved to the state.

### A. *Special Education is not Constitutionally Distinguishable From Public Education Provided to Children Without Learning Disabilities.*

The argument by respondents and the Association that special education is constitutionally distinguishable from ordinary education is based on two observations. First, special education is sometimes provided in private schools. Respondents and the Association attempt to distinguish it on this ground from the education provided in *Ambach* v. *Norwick*, 441 U.S. 68 (1979) [hereinafter, "*Ambach*"],[2] and to compare it to various forms of public assistance. The second observation is that, prior to 1972, the special education laws of Massachusetts were not as comprehensive as they became that year. While the observations themselves are true, neither supports the conclusion that special education is constitutionally distinguishable from public education provided to children without learning disabilities.

Considering the first observation, it should be apparent even on a superficial level that public functions cannot, in a constitutional sense, be distinguished from non-public functions on the basis of whether the function is being performed in a particular case by a

[2] *See* State Brief at 31 n.12; Association Brief at 14 n.14.

private entity. As cases like *Smith* v. *Allwright*, 321 U.S. 649 (1944), *Terry* v. *Adams*, 345 U.S. 461 (1953), and *Marsh* v. *Alabama*, 326 U.S. 501 (1946) [hereinafter, "*Marsh*"], establish, the hallmark of any public function is that it remains a public function regardless of where or by whom it is performed.[3]

Respondents and the Association contend that, if the public function doctrine is not confined in this case to teaching performed in state-owned buildings by state employees, there is no principled basis for distinguishing between the provision of education by private schools under Chapter 766 and the provision of other services by third-party vendors under purchase of service contracts with the state. They are mistaken. There is a fundamental distinction between education (special or otherwise) and other goods or services. Massachusetts children have a statutory right to suitable education. *See, e.g., Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. [1981] 502, 515, 417 N.E.2d 408, 415; *Amherst-Pelham Regional School Committee* v. *Department of Education*, 376 Mass. 480, 486-87, 381 N.E.2d 922, 927 (1978). Massachusetts residents have no statutory right to food, shelter, utility service, medical care, or other such services for which the state sometimes provides financial assistance.

Education is different. Massachusetts residents have a right to obtain suitable education, and the state has a correlative duty to provide it. In fact, education is compulsory. It is not difficult to understand why education has been singled out in this respect. Unlike subsidies which are provided for personal necessities, education is pro-

[3] The State respondents attempt unsuccessfully to distinguish *Terry* and *Marsh* on the ground that the private entities there entirely displaced the state. State Brief at 37-38. It is of course true that schools other than New Perspectives also provide special education in Massachusetts, but it is no less true that elections were held in many other counties in Texas which were not dominated by the Jaybirds and literature could be distributed in many other towns in Alabama which were not owned by the Gulf Shipbuilding Corporation. Indeed, in *Marsh* there was a concededly public highway just thirty feet from the privately-owned sidewalk at issue. 326 U.S. at 503. The fact that other schools, counties, or towns exist where people can go to express opinions without fear of dismissal or arrest or in which, regardless of their race, they may vote for public officials is no justification for permitting the abridgment of constitutional rights in a particular school, county, or town.

vided to meet society's collective need for a literate population, conscious of its civic obligations and sharing certain values necessary for the maintenance of our democratic institutions. This explains two of the characteristics which most distinguish education from other services subsidized by the state: It is compulsory, and it is provided to all, without regard to financial need. It also explains why public officials play such an active role in designing and implementing curricula, establishing requirements for teacher and school accreditation, and overseeing the proper maintenance of educational standards generally.

Even a cursory examination of Chapter 766 and the regulations thereunder reveals that, despite the occasional use of private schools to provide education to children with learning disabilities, a resident's statutory right to receive and the state's statutory duty to provide special education are now as firmly established as the right to receive and the duty to provide regular education. The respondents' and the Association's suggestions to the contrary notwithstanding, the state's duty is by no means limited to determining eligibility for special education "scholarships" or entering into purchase of service contracts with third-party vendors of educational services.[4]

[4] Specifically, public officials are initially charged with the responsibility for evaluating the physical, emotional, and psychological needs of each child suspected of having learning disabilities. Mass. Gen. Laws Ann. ch. 71B, § 3 (West Supp. 1981); A. 4-5. They are then required to design an Individualized Educational Plan ("IEP") for each child diagnosed as having such needs. 603 Code Mass. Regs. § 28, pars. 322.0, 322.1 (1979); R.A. 11-13. The IEP is a detailed blueprint of the child's educational program. The IEP includes such specific items as quarterly and annual educational objectives, appropriate educational approaches and methods to achieve those objectives, the frequency and duration of particular types of instruction, the need for any special equipment or materials, and the size of the group in which instruction should be provided. 603 Code Mass. Regs. § 28, par. 322.1 (1979); R.A. 11-13. If at all possible, the IEP must be implemented by the child's regular public school to facilitate the child's full and immediate integration into society.

If appropriate education is unavailable at the local public school, then and only then may the school committee refer the child to an outside institution. Even then, however, much more is involved than providing tuition money and finding a private school willing to accept the child. First, before a school may even be considered eligible to receive a child referred by a local school committee, it must be accredited by the state. The standards for accreditation are much stricter than those applicable to

Instead, it embraces all aspects of special education.[5]

Even after the child is placed in the private school,[6] the state con-

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ordinary private schools. *Compare, e.g.*, 603 Code Mass. Regs. § 28, par. 802.4 (1979); R.A. 16 (requiring that all teachers providing education at approved Chapter 766 schools now be state certified or approved) *with* Mass. Gen. Laws Ann. ch. 76, § 1 (West Supp. 1981) (no requirement that school teachers in private schools not approved under Chapter 766 be state certified or approved). *See also* Guidelines for the Approval of the Day Educational Component in Private Schools Under Chapter 766; K.R. 105-140 [the "Guidelines"]. In order to be eligible to receive any particular child, the approved school is required by law to agree to implement the state-developed IEP, 603 Code Mass. Reg. § 28, par. 804.1 (1979); A. 14; *Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. [1981] 502, 506, 417 N.E.2d 408, 410-11, regardless of any philosophical or pedagogical objections the school might have to the objectives, methods, or approaches specified in it. All of this underscores the state's ongoing interest and involvement in, and above all its continuous legal responsibility for, the child's education.

[5] The Association is mistaken when it states that parents of special needs children are "entitled . . . to select an alternative special education placement in a private school" if they are dissatisfied with the placement suggested by the school committee. Association Brief at 12-13. The School respondents appear to make the same error. School Brief at 23-24. The case they cite in support of this proposition, *Amherst-Pelham Regional School Comm.* v. *Dep't of Educ.*, 376 Mass. 480, 381 N.E.2d 922 (1978), held only that when the Bureau of Special Education Appeals determines that a program proposed by the school committee is inadequate and recommends that the child instead be placed in the same institution in which his parents had placed him pending appeal, the parents are entitled to reimbursement for tuition payments, retroactive to their rejection of the program held on appeal to be inadequate. The opinion makes clear, however, that the parents do not have a right to select an alternative placement. In fact, the court warned that parents who, pending appeal, enroll their child in a school not recommended by the school committee "assume[ ] a financial risk that the bureau [will] recommend a different placement." 376 Mass. at 493, 381 N.E.2d at 931.

[6] Although both the School respondents, School Brief at 5, and the Association, Association Brief at 2-3, maintain that the School controls its own admissions, the record suggests otherwise. For instance, the contract between the School and the Boston School Committee provides, in Article I, that the School "*shall* provide services to 28 pupils" and that "if pupils are referred to the [School] for service in excess of the number provided for under this contract, the [School] shall not be required to accept such extra students if the addition of such students would exceed their capacity or if the [School] is not equipped to conform to said extra students [sic] educational plan." K.R. at 91-92 (emphasis added). The School therefore appears to have no discretion with respect to the acceptance of students referred by the Boston School Committee. If it can accommodate them and if it is "equipped" to implement their IEP's, it must accept them.

tinues to exercise ultimate responsibility for the course of his education.[7] The school is required to report periodically on the child's progress, with a view toward returning the child to his regular public school as soon as possible. 603 Code Mass. Regs. § 28, par. 804.2 (1979); A. 14. Moreover, the state is required to continue to evaluate the child's needs and to revise his IEP whenever necessary. Mass. Gen. Laws Ann. ch. 71B, §§ 2, 3 (West Supp. 1981); A. 3-9. *Commonwealth* v. *School Committee of Springfield*, Mass. Adv. Sh. [1981] 502, 506, 417 N.E.2d 408, 410. Thus, the state never ceases to have ultimate responsibility for the structure, content, and progress of the child's education, as well as for its entire cost.[8]

Although the point could hardly be clearer that the state's responsibility for the provision of special education is quantitatively and qualitatively different from its responsibility for various other goods and services for which public assistance is occasionally provided,

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[7] As discussed in note 4, *supra*, with respect to individual children referred by school committees, the Association is wrong when it asserts that "Chapter 766 does not authorize the state . . . to require the adoption of any particular educational program" and that "the operation of private schools providing special education is independent of state control." Association Brief at 15, 17. Similarly, the Association and the School respondents are incorrect when they assert that the only recourse of a school committee dissatisfied with a placement is removal of the child from the school. Association Brief at 16; School Brief at 5. Since the school must agree to implement the child's IEP, it would be liable for breach of contract if it failed to do so. See also Contract for Special Educational Services Between The Boston School Committee and New Perspectives School, Inc., Articles I and IX, which expressly make the School liable for its failure to carry out each child's educational plan. K.R. 91, 97-98.

[8] "This close monitoring of a child placed in a private school, and of the private school itself under c. 766 and its regulations, suggests that both in purpose and effect the statute does not aid the private school in carrying out its essential function . . . . Rather, the statutory scheme fulfills *the obligation of the public school system* which has itself chosen not to provide the services in its own schools." *Commonwealth* v. *School Comm. of Springfield*, Mass. Adv. Sh. [1981] 502, 519, 417 N.E.2d 408, 417-18 (footnote and citations omitted; emphasis added). Since the public school system is ultimately responsible for the provision of special education, it is difficult to understand the Association's argument that, because the statute permits school committees to contract with private schools, there has been no delegation. Association Brief at 23. The argument is apparently based on the erroneous premise that there can only be a delegation of responsibility when the delegation is unauthorized.

any possible doubt is dispelled by 603 Code Mass. Regs. § 28, par. 504.4(b) (1979); R.A. 13 (emphasis added), which provides:

> If the administrator of Special Education Programs . . . cannot locate any program that can provide all elements of the child's IEP, the school committee shall request assistance from the Division in obtaining money with which to establish a program. *If no such program can be located, the school committee shall, with or without outside financial assistance, establish such a program itself or through a collaborative.*

Thus, the state is not only the provider of first resort, but the provider of last resort as well.[9] Unlike housing, medical care, nutrition, utilities, or any other good or service for which subsidies or third-party payments may be provided, the state guarantees that each child, regardless of financial need, shall have suitable, publicly-funded education, the structure, content, and provision of which is determined and monitored by the state *even if the state must establish a suitable program itself.*[10] This is indeed the essence of the distinction between services like education, to which there is a right, and services like medical care, toward which the state makes only a financial contribution but generally which are not otherwise the

[9] If the School respondents are correct that "the best means of testing the requirement of 'tradition' is to ask whether the service or function in question is so intimately related to our historic notion of 'state-ness' that it would be supplied by the state but for the existence of the private counterpart," School Brief at 21, then even they must concede that Massachusetts has attempted to supply by statute and regulation what they argue is absent in tradition. In any event, the School respondents err when they maintain that special education, at least in Massachusetts, "is not a service 'of such public importance that the State invariably either provides the service itself or permits private companies to act as state surrogates in providing it.' " *Id.*, *quoting Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 372 (1974) (Marshall, J., dissenting) [hereinafter, "*Jackson*"].

[10] It is also significant that Chapter 766 appears to have made public education compulsory for children with special needs. 1972 Mass. Acts ch. 766, § 12, *amending* Mass. Gen. Laws ch. 76, § 1 (making exemption from compulsory education law for physically or mentally disabled students "subject to" the provisions of Chapter 766). Needless to say, there are no comparable laws compelling citizens to take advantage of the state's other public assistance programs. This again underscores the point that society is the ultimate beneficiary of special education programs.

responsibility of the state to provide.[11] The attempt by respondents and the Association to draw a constitutional distinction between special education and regular education thus overlooks the dispositive element which special and regular education have in common and which distinguishes them from such other services. The state has undertaken to provide both forms of education as a matter of right. In doing so, it has firmly committed itself to providing all residents with a suitable public education.

The observation that the Massachusetts special education laws were less comprehensive before 1972 is also an invalid basis for drawing a constitutional distinction between the public education now provided to children with special needs and that provided to children without learning disabilities. For too long, Massachusetts gave preference to children without special needs. The adoption of Chapter 766 in 1972 marked a turning point; it signified a legislative recognition of society's obligation for the development of the full educational potential of every child. It makes no sense to declare as a matter of federal law that Massachusetts is forever precluded from fully integrating special needs children into its system of public education and, ultimately, society simply because this recognition was belated.[12] States can and must be permitted to determine for themselves the kinds of programs, including special education programs, which they can mandate in their systems of public education.[13] By statute, Massachusetts has chosen to include special

[11] *See, e.g.*, Butler, *The Medicaid Program: Current Statutory Requirements and Judicial Interpretations*, 8 Clearinghouse Rev. 7, 12 (1974).

[12] Such a result would be comparable to holding that constitutional standards apply to traditional academic courses but not to kindergarten or vocational education programs or, indeed, even to new academic courses which are recently added to an existing curriculum.

[13] Even prior cases which have applied the tradition and exclusivity test have never suggested that the precise contours of a public function are forever determined with reference to particular services performed under the rubric of that function in the past. *See, e.g., Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149 (1978) [hereinafter, "*Flagg*"]. In any event, if petitioners are correct that a sovereign function may be declared by statute as well as by virtue of being traditionally exclusively associated with sovereignty, then it is irrelevant that the present special education scheme dates back only to 1972.

education programs as part of its public education curriculum, thus making regular education and special education constitutionally indistinguishable. The inquiry therefore properly returns to the question reserved in *Flagg* and, it would appear, answered in *Ambach*: Is public education a sovereign function?

B. *Public Education is a Sovereign Function.*

*Flagg* expressly and necessarily reserved the question of whether public education is a sovereign function.[14] Respondents and the Association reply that even if *Flagg* left open this question, then, notwithstanding *Ambach* and the other arguments presented in Petitioners' Brief, the question must be answered in the negative. Otherwise, they argue, our long tradition of independent private education would be in jeopardy. That simply is not so. When parents exercise their constitutional right to reject public education

[14]Despite the fact that *Flagg* expressly reserved the question whether public education is a sovereign function, 436 U.S. at 163-64, respondents and the Association continue to insist that *Flagg* decided this issue in their favor. In order to make it even clearer that *Flagg* did not decide this question, it may be helpful to disregard for the moment the express reservation language in *Flagg* and ask whether, apart from that language, the present inquiry is foreclosed. The answer is surely no. *Flagg* held only that dispute resolution is not so traditionally and exclusively associated with sovereignty that all dispute resolution, including private dispute resolution, invariably involves the exercise of sovereign power. *Flagg* did not consider the very different question whether dispute resolution is a sovereign function when performed by the state or its delegate in response to a resident's exercise of his right to submit his dispute to the judicial process for resolution. For example, it did not consider what would have happened if respondents in *Flagg* had brought suit in state court to replevy their goods and if the state court judge, in accordance with state law, *see, e.g.*, Mass. R. Civ. P. 53, 365 Mass. 730, 817 (1974), had referred the matter to a private special master. Even though private dispute resolution is not a public function, the private master would be under a constitutional obligation to find the facts in a fair and impartial manner. *See Schwimmer* v. *United States*, 232 F.2d 855, 865 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956) ("But since the thing being done by a Master is a judicial incident, it necessarily is subject to such judicial standards as are applicable to any performance of it by the Court itself"). Since *Flagg* was concerned only with the determination of whether private dispute resolution remains a public function even when neither party exercises his statutory right to submit the dispute to the judicial process, it did not decide the question presented here, which is whether a private entity performs a public function when it discharges the state's obligation to provide goods or services to which residents are entitled by statute.

in favor of private education, *see, e.g., Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1972); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), the schools to which they send their children do not perform a public function and, quite properly, are not subject to the Fourteenth Amendment when they provide education to those children. It is only when a parent claims his statutory right to have the state provide his child a suitable public education that the Fourteenth Amendment comes into play, whether the state discharges its obligation by providing instruction in a traditional public school or through an ostensibly private school like New Perspectives.[15]

Moreover, even schools which accept children referred under Chapter 766 need not fear that their educational independence will be jeopardized if the Court holds that teachers enjoy the protection of the Fourteenth Amendment. In the first place, a teacher's right to speak out on such matters as educational philosophy, course content, or methods of instruction will still be subject to reasonable time, place, and manner restrictions. *See Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 415 n.4 (1979). More important, the right to express an opinion does not carry with it the right to make a decision. Subject to school policy and Chapter 766 requirements, school administrators will be free to disregard the views of teachers and will have final decision-making authority on matters of educational policy.

Respondents' final argument against recognition of public education as a public function is that a school which accepted the referral of even one child under Chapter 766 would then be subject to the full range of Fourteenth Amendment obligations in all its activities. Again, respondents are mistaken. Petitioners are advocating a functional approach, analogous to that adopted in *Polk County* v. *Dodson*, ___ U.S. ___, 50 U.S.L.W. 4077 (December 14, 1981). Under this approach, a school would be subject to the Fourteenth

[15] "The private placement provisions of c. 766 only apply to a child *who seeks services in the public school system* and who is then identified as requiring special services which the school system either cannot, or chooses not to, provide." *Commonwealth* v. *School Comm. of Springfield*, Mass. Adv. Sh. [1981] 502, 514, 417 N.E.2d 408, 415 (emphasis added).

Amendment only to the extent it was performing a public function -- that is, only to the extent it was discharging the state's obligation to provide suitable education to Chapter 766 students. Petitioners do not deny that there may be instances where a school policy of general application has only an incidental impact on the education provided to a child referred under Chapter 766, or that, depending upon the significance of the impact, reasonable persons might differ as to the appropriate decision in such a case. The fact, however, that there may be marginal cases should not determine the outcome of this case, where all the students at the School were referred by public authorities,[16] where petitioners are teachers and counselors who allege they were discharged for exercising a right which the Court has repeatedly held to be especially critical in the field of education, and where the speech for which petitioners allege they were discharged was closely related to the School's provision of special education.[17] Nor should it prevent the Court from providing

[16] The State respondents maintain that the School could have accepted private referrals. State Brief at 7, 16. The record is clear, however, that all fifty students at the School in December, 1977 had been referred by school committees or state agencies. J.A. 90. Even the seven students who were referred by state agencies, as distinguished from school committees, presumably were referred pursuant to Chapter 766 and the regulations thereunder. *See* Mass. Gen. Laws Ann. ch. 71B, §§ 1-3 (West Supp. 1981); A. 2-9; 603 Code Mass. Regs. § 28, par. 700 (1979); R.A. 14-15.

[17] The State respondents maintain that even if the School was performing a public function, the dismissal in *Rendell-Baker* was "unrelated to the school's provision of Chapter 766 education." State Brief at 41. The speech for which Ms. Rendell-Baker alleges she was dismissed was speech at a meeting of the School's Board of Directors in which she supported a request by her students that they be given more responsibility in school affairs. One would have to take an exceedingly restrictive view of what constitutes the educational process to conclude that teachers and educational counselors who support the requests of their students for more responsibility in school affairs are acting outside the scope of their teaching and counseling responsibilities or that the School's dismissal of teachers and counselors in retaliation for such speech is "unrelated to the school's provision of Chapter 766 education." Such a restrictive view would certainly be inconsistent with the view of the role of teachers and the educational process which the Court articulated in *Ambach*.

Moreover, Massachusetts itself apparently takes no such narrow view of the role of special needs teachers. Effective September 1, 1979, all new professional personnel hired by Chapter 766 approved schools have to be certified or approved. 603 Code

guidance to lower courts by articulating the appropriate legal standard to be applied in future cases. For all that has been written, that standard is both narrow and simple: Ostensibly private schools should be regarded as instrumentalities of the state for purposes of the Fourteenth Amendment and 42 U.S.C. § 1983 at least to the extent that they are retained by

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Mass. Regs. § 28, par. 802.4; R.A. 16. Such professional personnel are to be approved under Regulations for Approval of Professional Personnel for Special Education adopted by the State Board of Education. 603 Code Mass. Regs. § 28, par. 1000.0; R.A. 18. The Board of Education published new regulations governing the certification of teachers of special needs students on June 14, 1979, effective September 1, 1982. Massachusetts Register No. 162 (June 14, 1979). Regarding classroom teachers in general, these new regulations provide as follows:

> The effective teacher is equitable, sensitive and responsive to all learners. To meet this standard, the candidate will demonstrate that he or she:
>
> 1. defends and encourages the exercise of students' rights to equal treatment and freedom of expression
> 2. responds to the needs of individual students so as to enhance their self-esteem
> 3. works toward a learning environment favorable to open inquiry and devoid of ridicule
> 4. encourages a positive atmosphere for all students, especially those with special needs
> 5. avoids and discourages racial, sexual, social, ethnic, religious, physical, and other stereotyping . . . .

603 Code Mass. Regs. § 7, par 7.04(2)(e) [effective September 1, 1982]; R.A. 4. With respect to teachers of special needs students, in particular, the new regulations provide:

> [T]he candidate will demonstrate that he or she:
>
> 1. responds to the needs of individual students so as to enhance their self-esteem and development
> 2. establishes constructive relationships with parents and others primarily concerned with the well-being of his or her students
> 3. works to develop a learning environment which is favorable to openness of inquiry and devoid of ridicule . . . .

603 Code Mass. Regs. § 7, par. 7.04(40)(f) [effective September 1, 1982]; R.A. 8. Of course, because these regulations are not yet effective and would not appear to be retroactive, petitioners do not contend that they control the instant case. However, these regulations do evince the state's recognition that effective teaching is not limited to course instruction.

the state to discharge the state's legal obligation to provide educational services.

## II. Considering the Purpose of the State Action Requirement, the School's Actions Must be Fairly Treated as Those of the State Because Substantial Traditional Indicia of State Action are Present and the Balance of Interests in this Case So Warrants.

Petitioners argue in their principal brief that the action of the School is properly attributable to the state not only because the School is discharging a public function, but also because, taking into account (1) the substantial indicia of state action which are present, (2) the fundamental purpose of the state action requirement, and (3) the constitutional interests competing in this case, petitioners' free speech interests warrant greater protection than the School's privacy interests. The respondents and the Association seek to dismiss this basis for state action on three alleged grounds: (1) it is novel; (2) it eliminates the state action requirement and subsumes the merits of the litigation in the state action determination; and (3) in any balancing of interests, the respondents' interest in institutional autonomy should prevail.[18] Each of these arguments will be addressed in this portion of petitioners' reply brief.

Because there are significant errors in respondents' and the Association's restatement of petitioners' position, it may be helpful at the outset to review very briefly just what petitioners are and are not advocating. First, petitioners are not advocating that the Court abandon its search for traditional indicia of state action such as substantial public funding and regulation, interdependence between the public and private sectors, and the performance by a private actor of a function commonly associated with sovereignty. Nor is petitioner advocating that the Court discard or even relax the

[18] In addition, the State respondents suggest that petitioners' second basis for state action was not fairly encompassed by the petition for certiorari. State Brief at 57 n.24. This latter suggestion notwithstanding, the balancing approach which serves as the petitioners' second basis for state action is set out — in great detail — in the petition for certiorari. *See* Petition for Certiorari at 52-57.

requirement that such factors be present to some significant degree before a court may treat a private party as an instrumentality of the state. Petitioners' position should be clear: When traditional indicia of state action are present such that a fair question arises as to whether there is sufficient public involvement to consider certain actions to be "state action," it is appropriate to decide that question by examining the interests competing for protection in light of the purpose of the state action requirement.

A. *The Examination of the Purpose of a Constitutional Provision is not Novel but is a Fundamental Tenet in Constitutional Adjudication.*

The examination of the purpose of a constitutional provision and the determination of how that purpose would best be served in a particular case are perhaps among the oldest tenets in American jurisprudence. *See, e.g., McCulloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316, 407 (1819) (relying on the purpose of the constitutional powers granted the federal government to uphold the creation of a national bank); *cf. Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 177 (1803) (relying on the fundamental principle underlying a constitution to support judicial review). Moreover, the examination of constitutional purpose has never been confined to the great questions first considered by the Marshall Court. *See, e.g., United States* v. *Classic,* 313 U.S. 299, 316 (1941).[19]

[19] In *United States* v. *Classic,* 313 U.S. 299 (1941), Justice Stone wrote for the Court:

> [I]n determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government . . . . If we remember that 'it is a Constitution we are expounding,' we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose.

*Id.* at 316 (citations omitted).

The fundamental purpose of the state action requirement of the Fourteenth Amendment is to protect legitimate zones of privacy against unauthorized judicial encroachment. Since the state, *qua* state, has no legitimate zone of privacy, any abridgment by the state of liberties which are the subject of the Fourteenth Amendment, such as the mandatory separation of the races, is prohibited. At the other end of the spectrum, purely private discrimination, such as an individual's refusal to admit certain persons into his home because of their race, religion, or political beliefs, involves the exercise of a legitimate privacy right and is beyond the reach of Section 1 of the Fourteenth Amendment. Between these two extremes, however, public and private activity may combine in literally countless ways, and it is often far from clear whether the action should be considered public or private for purposes of the Fourteenth Amendment.[20] Under those circumstances courts should and do[21] weigh the competing constitutional interests and strike a balance true to the purpose of the state action requirement. This reliance on the purposes behind the state action requirement is particularly appropriate in difficult cases. For example, in *Terry* v. *Adams*, 345 U.S. 461 (1953), the Court found that the all-white primary of the

[20] It should be clear from what has been said thus far that petitioners do not take the position that the only conduct which is beyond the reach of the Fourteenth Amendment is conduct which is also beyond the reach of the state's police power. Under petitioners' balancing analysis, a court might well conclude that privacy interests in a particular case outweigh, for example, due process interests, as was the case in *Jackson*, even though the state could have prohibited the challenged conduct under its police power had it chosen to do so. Thus, to the extent that state action requirement also stands as a barrier against the erosion of federalism principles, *see generally* L. Tribe, *American Constitutional Law* § 18-2 at 1149 (1978), petitioners' balancing approach will in no way impede the performance of that vital function.

[21] *E.g.*, *Marsh*, 326 U.S. at 509 (1946) (quoted and discussed in Petitioners' Brief at 29-30). Contrary to the suggestion of the State respondents, State Brief at 60-61 n.27, the balancing of interests undertaken by the *Marsh* Court did not occur only after state action had been found. At the outset of its opinion, the Court in *Marsh* noted that the town of Chickasaw's ban on free speech clearly would have been unconstitutional had the town been a traditional municipal corporation. 326 U.S. at 504. Hence the only question for the Court to decide was state action, *id.* at 505, and it was in deciding this issue that the Court noted the balance between the rights of free speech and private property. *Id.* at 509.

Jaybird Democrats, a primary which preceded the regular Democratic primary, constituted state action which violated the Fifteenth Amendment. All three opinions for the majority in *Terry* relied on constitutional purpose.[22]

In asking the Court to consider the constitutional interests at stake and to measure those interests in light of the fundamental purpose of the Fourteenth Amendment and the state action requirement, the petitioners ask the Court to do no more than the Court has done before, both in state action cases and in other constitutional litigation. State action questions cannot be decided in a vacuum, but only with reference to the interests at stake and the purpose of the requirement.

### B. *The Proposed Test Neither Eliminates the State Action Requirement Nor Subsumes the Merits of the Litigation in the State Action Determination.*

Respondents and the Association contend that petitioners' second basis for state action either eliminates the state action require-

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[22] In an opinion for three members of the Court, Justice Black relied on the purpose of the Fifteenth Amendment and concluded that the Amendment did not permit the functional equivalent of an all-white primary sponsored by the county. 345 U.S. at 469. In an opinion for four members of the Court, Justice Clark relied on the "broad and lofty aims" of the Fifteenth Amendment to conclude that where a state had effectively "devolve[d] upon a political organization the uncontested choice of public officials" that political organization must be regarded as a state actor. *Id.* at 484. In a separate opinion, Justice Frankfurter also devoted considerable attention to the need to rely on the underlying purpose of the Fifteenth Amendment in deciding the state action question:

> This case is for me by no means free of difficulty. Whenever the law draws a line between permissible and forbidden conduct cases are bound to arise which are not obviously on one side or the other. These dubious situations disclose the limited utility of the figure of speech, a 'line,' in the law. Drawing a 'line' is necessarily exercising a judgment, however confined the conscientious judgment may be within the bounds of constitutional and statutory provisions, the course of decisions, and the presuppositions of the judicial process. If 'line' is in the main a fruitful tool for dividing the sheep from the goats, it must not be forgotten that since the 'line' is figurative the place of this or that case in relation to it cannot be ascertained externally but is a matter of the mind.
>
> Close analysis of what it is that the Fifteenth Amendment prohibits must be made before it can be determined what the relevant line is in the situation presented by this case.

*Id.* at 472.

ment[23] or subsumes the merits of the case in the state action determination.[24] Both contentions are without foundation. Petitioners' second basis for state action requires a balancing of the constitutional interests at stake in light of the purpose of the Fourteenth Amendment and the state action requirement, but it also carefully limits that balancing to instances in which substantial, traditional indicia of state action are already present. Petitioners' Brief at 31-34. Moreover, the consideration of competing constitutional interests for the purposes of the state action determination is a distinct test from a consideration of the merits of the litigation. *See* Petitioners' Brief at 34-41.

Rather than address petitioners' second basis for state action, the respondents and the Association focus their arguments on commentary which they contend would eliminate the state action requirement if adopted by the Court. Petitioners noted the arguments of commentators in their brief, *see, e.g.*, Petitioners' Brief at 31 n.31, but also expressly distinguished the arguments of those commentators from the petitioners' test. *Id.*

In the case at bar, the traditional indicia of state action are clearly sufficient to belie the notion that the School's conduct was purely private: interdependence between the state and the private entity; substantial state funding and regulation; the express delegation of the traditional governmental function of education; and the virtually complete dependence of the School on the state for all of its business. *See* Petitioners' Brief at 34-35. Thus to hold that the action of the School amounted to state action requires no compromise whatsoever of the principle that the state must have some significant affirmative involvement before the Fourteenth Amendment applies. Petitioners' analysis merely acknowledges that the significance of traditional indicia of state action often cannot be determined by the mechanical process of seeing if a similar configuration of indicia were ever presented before to the Supreme Court. Indeed, this Court itself recently suggested that similar indicia of state action may nonetheless produce different state action

[23] *See* School Brief at 29-30; Association Brief at 26.

[24] *See* School Brief at 29-31; State Brief at 61; Association Brief at 26.

determinations.[25] Manifestly, the petitioners' analysis does not eliminate the state action requirement; it only provides a rational framework for its application by lower courts.

Respondents and the Association also mistakenly argue that petitioners' balancing approach substitutes an inquiry on the merits for the state action inquiry. The two inquiries are distinct. The state action analysis balances the free speech interests of teachers, students, parents, and the community against the School's claim that it is sufficiently independent of the State that it need not even account to any of those constituencies for its decision to censor teachers. The analysis on the merits assumes that the School is accountable and balances free speech interests against the interest of any school, public or private, to be free from excessive disruption of the educational process. *See, e.g., Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 284 (1977); *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968). The outcome of the balancing on the merits may depend upon any number of factors, including, for example, whether the speech was made publicly or privately, *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 415 n.4 (1979), or its purpose and its effect, if any, on the educational process. On this record, however, since the courts below did not even reach the merits, respondents are foreclosed from arguing that the petitioners' speech was "disruptive" or "therapeutically contra-indicated for the particular handicapped children for whom the school has undertaken the responsibility of education and care." Association Brief at 26, 27. *See also* School Brief at 31-32. Those are precisely the kinds of inquiries a lower court would properly make if the merits were reached.

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[25] *Compare Branti* v. *Finkel*, 445 U.S. 507 (1980) (public defender acts under color of state law when he makes personnel decisions on the basis of political affiliation) *with Polk County* v. *Dodson* ____ U.S. ____, 50 U.S.L.W. 4077, 4080 (December 14, 1981) (public defender does not act under color of state law when she dismisses an appeal as frivolous).

### C. *In Striking the State Action Balance, Petitioners' Free Speech Interests Outweigh the Privacy Interests of the School.*

The School respondents argue that, on balance, their "constitutional right to free association, privacy and institutional autonomy" outweigh petitioners' free speech interests. School Brief at 31. The Association contends that the rights of private schools to develop and implement independent educational philosophies outweigh petitioners' free speech interests, and that, by electing to teach in the School, petitioners waived their right to freedom of expression. Association Brief at 28-30.

Considering the waiver issue first, if there were any waiver, it was surely by the School, not by petitioners. It was the School which elected to become an adjunct of the public education system by accepting state funding and students referred by state agencies, by submitting to state regulation, and by agreeing to discharge the state's obligation to provide referred students with the suitable education which is theirs by right. Petitioners, on the other hand, no more waived their constitutional rights than did black voters in *Terry* who chose to live in Fort Bend County, Texas or employees of the Gulf Shipbuilding Company in *Marsh* who chose to live in Chickasaw, Alabama. In fact, since state law would have prohibited the referral of students to the School if the traditional public school had been able to provide them suitable education, petitioners had little, if any, choice other than to teach at a school such as New Perspectives if they wished to teach such students at all. Finally, there is the more fundamental question of whether students who are sent to the School by the state to receive their public education, the parents of such children, the taxpayers who pay for that education, and concerned citizens also have a sufficient interest in preserving teacher free speech to warrant constitutional protection for it. Surely they have. Just as surely, it would be anomolous to hold that the very fact that a private school is providing public education not only gives rise to the need for such protection but at the same time constitutes the justification for withholding it.

Concerning the issue of institutional autonomy, it must again be emphasized that the issue before the Court is not whether the School must adopt or even listen to petitioners' speech. That decision will remain the School's, whatever the final outcome of this case. Nor is the issue even whether petitioners had the right to utter the particular remarks they did, under the circumstances they uttered them, since that question goes to the merits and, on remand, is properly addressed by the lower court. The only issue before this Court is whether the School should be at all accountable for its attempt to suppress petitioners' speech. It is difficult to see how the School's educational mission will in any way be jeopardized merely because, having assumed responsibility for the provision of public education, the School is called upon to justify its attempt to censor the teachers and counselors who provide that education.

## Conclusion

For the reasons stated in Petitioners' Brief and herein, the judgment of the court of appeals in *Rendell-Baker* should be reversed, and the case should be remanded for further proceedings. Similarly, the judgment of the court of appeals in *Klug* should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

ZACHARY R. KAROL*
S. ELAINE RENFRO
RICHARD J. YURKO
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110
(617) 357-9300

ALAN JAY ROM
Lawyers' Committee for Civil
Rights Under Law of the
Boston Bar Association
294 Washington Street, Suite #506
Boston, Massachusetts 02108

JOHN REINSTEIN
Civil Liberties Union of
Massachusetts Foundation, Inc.
47 Winter Street, 6th Floor
Boston, Massachusetts 02108
*Counsel for Petitioners*

* Counsel of Record

# APPENDIX

## ADDITIONAL REGULATORY PROVISIONS

**603 Code of Massachusetts Regulations, Section 7, Paragraphs 7.04(1), (2), (40), (41)(a)&(f), (42)(a)&(f), (43)(a)&(f), (44)(a)&(f), and (45)(a)&(f) (effective Sept. 1, 1982):**

7.04 *Individual Programs and Program Standards*

(1) *General.* The standards listed in this section will be used to evaluate institutional programs as described in Section 7.03, individual programs as described below, and individual experience as described in Section 7.05. Applicants for certification who have not completed an approved institutional program and who are not applying through the alternative procedures described in Section 7.05, must submit to the Bureau proof of successful completion of the semester hour and other requirements listed below under the certificate sought. It is the responsibility of the candidate to establish to the satisfaction of the Bureau that the courses and other experiences submitted were appropriate to the development of the competencies specified under each of the standards. Courses counted toward one certificate may be counted towards additional certificates if they meet the standards, but practicums and internships will be counted towards one certificate only.

(2) *Classroom Teacher. (Common Standards)*

(a) *Standard I.* The effective teacher is knowledgeable in the field proposed for certification. (The competencies required to meet this standard are listed under each classroom teaching certificate.)

(b) *Standard II.* The effective teacher communicates clearly, understandably, and appropriately. To meet this standard, the candidate will demonstrate that he or she:

1. gives clear and concise explanations and directions

2. frames questions so as to encourage inquiry
3. uses appropriate metaphors, examples, and illustrations
4. makes the goals of teaching and learning clear to students
5. uses language appropriate to the age, developmental stage, special needs, and social, racial, and linguistic background of his or her students
6. serves as an example of clear and effective oral and written communication
7. listens to students
8. communicates effectively with parents

(c) *Standard III.* The effective teacher designs instruction to facilitate learning consistent with the needs and interests of the learners and so as to maintain a sense of order and purpose in the classroom. To meet this standard, the candidate will demonstrate that he or she:

1. understands the needs and interests of his or her students and designs or adapts the curriculum to meet these needs and interests
2. has clear goals for student learning
3. relates the elements of instruction sequentially to each other, to other fields of knowledge, to students' experiences, and to long-term goals
4. understands developmental psychology, and relationships between stages of growth

5. uses materials, media, and techniques appropriate to the age, developmental stage, special needs, and social, racial and linguistic background of his or her students, both individually and as a class
6. uses materials, media, and techniques suited to the subject matter and to meeting the goals of instruction
7. teaches, as necessary, the basic academic skills (reading, communication, mathematics) related to the goals of instruction
8. is aware of recent developments in teaching, particularly in his or her field(s) of knowledge
9. understands techniques of classroom management and how to maintain a sense of order in the classroom
10. makes effective use of appropriate resources in the community

(d) *Standard IV.* The effective teacher uses the results of various evaluative procedures to assess the effectiveness of instruction. To meet this standard, the candidate will demonstrate that he or she:

1. uses evaluative procedures appropriate to the age, developmental stage, special needs, and social, racial, and linguistic background of his or her students, and corrects for any ethnic, racial, or sexual bias in evaluation

2. interprets the results of evaluative procedures, and uses these results to improve instruction both for the class as a whole and for individual students
3. identifies problems in reading which inhibit learning and works toward remedying these problems
4. encourages the involvement of students in evaluation of instruction
5. evaluates his or her own role, behavior, and performance in the classroom

(e) *Standard V.* The effective teacher is equitable, sensitive, and responsive to all learners. To meet this standard, the candidate will demonstrate that he or she:

1. defends and encourages the exercise of students' rights to equal treatment and freedom of expression
2. responds to the needs of individual students so as to enhance their self-esteem
3. works toward a learning environment favorable to open inquiry and devoid of ridicule
4. encourages a positive atmosphere for all students, especially those with special needs
5. avoids and discourages racial, sexual, social, ethnic, religious, physical, and other stereotyping
6. makes allowances for biases and limitations in his or her own background which limit his or her responsiveness to students from other backgrounds.

(40) *Teacher of Young Children with Special Needs*
(3-7 years old)

(a) *Requirements*

1. completion of a pre-practicum consisting of 30 semester hours of course work and other experiences as defined in Standards I-V below
2. completion of a practicum, judged successful on the basis of Standards I-V, one-third of which must be with young children (3-7 years old) identified as needing special education, and one-third of which must be with young children not so identified

(b) *Standard I.* An effective teacher of young children with special needs knows:

1. developmental psychology and the psychology of early childhood in general
2. in particular, the characteristics and the educational, social, and emotional significance of developmental deviations and special needs
3. theories of learning; theories of language acquisition, the normal sequence of language development, and the effect of language disorders on learning
4. characteristics of family, parent-child, and sibling relationships, and their significance for young children with special needs
5. the subject matter of early childhood education

6. federal and state laws and regulations pertaining to special education, and community and governmental resources for young children with special needs

(c) *Standard II.* The effective teacher of children with special needs communicates clearly, understandably, and appropriately. To meet this standard, the candidate will demonstrate that he or she:

1. uses language appropriate to the age, developmental stage, and social, racial, and linguistic background of his or her students
2. makes the goals of teaching and learning activities clear to students
3. gives clear and concise directions and explanations
4. uses non-verbal communication appropriately and alternative communication systems as needed
5. listens to students

(d) *Standard III.* The effective teacher of children with special needs designs instructions to facilitate learning consistent with the needs and interests of learners and so as to maintain a sense of purpose and order in the classroom. To meet this standard, the candidate will demonstrate that he or she:

1. systematically observes and records student behavior and student-teacher interaction
2. consults with other school personnel, other professionals, and parents concerning specific techniques for motivation

3. develops and implements appropriate educational plans
4. designs and implements appropriate instructional programs, both academic and vocational
5. selects, adapts, and designs materials and procedures for learners in these programs
6. identifies and adapts environmental elements in the classroom which will enhance learning
7. uses a variety of instructional techniques

(e) *Standard IV.* The effective teacher of children with special needs uses the results of various evaluative procedures to assess the effectiveness of instruction. To meet this standard, the candidate will demonstrate that he or she:

1. uses and interprets evaluative procedures appropriate to the age, developmental stage, social, racial, and linguistic background, and ability of his or her students
2. monitors progress through periodic checks of individual students' mastery of specified objectives
3. systematically uses data from observation and assessment to make decisions on programmatic changes
4. evaluates his or her own role, behavior, and performance

(f) *Standard V.* The effective teacher of children with special needs is equitable, sensitive, and responsive to all learners. To meet this standard, the candidate will demonstrate that he or she:

1. responds to the needs of individual students so as to enhance their self-esteem and development
2. establishes constructive relationships with parents and others primarily concerned with the well-being of his or her students
3. works to develop a learning environment which is favorable to openness of inquiry and devoid of ridicule
4. makes allowances for biases and limitations in his or her own background which restricts his or her responsiveness to students from other backgrounds

(41) *Teacher of Children with Severe Special Needs* (N-12)

(a) *Requirements*

1. completion of a pre-practicum consisting of 30 semester hours of course work and other experiences as defined in Standards I-V, below.
2. completion of a practicum, judged successful on the basis of Standards I-V, with children with severe special needs

. . .

(f) *Standard V.* See Section 7.04 (40) (f) above

(42) *Teacher of Children with Moderate Special Needs* (N-9) (5-12)

(a) *Requirements*

1. possession of a Massachusetts classroom teaching certificate
2. completion of a pre-practicum consisting of 30 semester hours of course work and other experiences as defined in standards I-V, below
3. completion of a half practicum (150 clock hours), judged successful on the basis of the standards, with children with moderate special needs

. . .

(f) *Standard V.* See Section 7.04 (40) (f) above.

(43) *Teacher of Children with Special Needs: Vision* (N-12)

(a) *Requirements*

1. possession of a Massachusetts classroom teaching certificate
2. completion of a pre-practicum consisting of 30 semester hours of course work and other experiences as defined in Standards I-V, below
3. completion of a half practicum (150 clock hours), judged successful on the basis of the standards, with children with special needs in vision

. . .

(f) *Standard V.* See Section 7.04 (40) (f)

(44) *Teacher of Children with Special Needs: Audition* (N-12)

(a) *Requirements*

1. possession of a Massachusetts classroom teaching certificate
2. completion of a pre-practicum consisting of 30 semester hours of course work and other experiences as defined in Standards I-V, below
3. completion of a half practicum (150 clock hours), judged successful on the basis of the standards, with children with special needs in audition

. . .

(f) *Standard V.* See Section 7.04 (40) (f)

(45) *Teacher of Children with Speech, Language, and Hearing Disorders* (All levels)

(a) *Requirements*

1. completion of 60 semester hours of course work and other experiences in the field of knowledge and pre-practicum as defined in Standards I-V, below
2. completion of a practicum, judged successful on the basis of the standards, with children with speech, language and hearing disorders, two-thirds of which may be in a clinical setting

. . .

(f) *Standard V.* See Section 7.04 (40) (f)

SOURCE: Massachusetts Register No. 162 (June 14, 1979).

**603 Code of Massachusetts Regulations**
**Section 28, Paragraphs 322.0-322.1 (1979):**

322.0 *Evaluation: IEP.*

The IEP for each child in need of special education shall be written by the TEAM and the Administrator of Special Education in accordance with the following provisions:

322.1 *Elements stated by the TEAM.*

After completion of the assessments which were part of the evaluation, and based on the results of those assessments, the TEAM shall meet to write the portion of the child's IEP for which it is responsible. That portion shall consist of the statements required by this paragraph (¶ 322.1) and any other information required by the Division.

322.1(a) A statement of the child's performance level, i.e., what the child can do.

322.1(b) A specific statement of the measurable physical constraints on such performance, i.e., what the child cannot do.

322.1(c) A specific statement describing the child's learning style.

322.1(d) A statement of the general (1 year) educational objectives and the specific (quarterly) objectives which the child can reasonably be expected to achieve. Such objectives shall be measurable and shall be listed in order of priority.

322.1(e) A statement of the suggested methodology and teaching approach for meeting the general objectives.

322.1(f) A statement of the types amd amounts of services (in terms of periods per day and per week) included within ¶ 503.1 which are necessary to enable the child to achieve the objectives, including a statement of the duration and frequency of the periods during which the child should receive the services.

322.1(g) A statement of any parent-child instruction which is necessary to enable the child to achieve the objectives. If the TEAM recommends parent-child instruction, the procedures of ¶ 323.1 shall be followed.

322.1(h) A statement of physical education services for the child, in accordance with ¶ 502.10(f).

322.1(i) A statement, in accordance with the provisions of ¶ 507.0, of the types of specialized materials and equipment necessary to enable the child to meet the objectives.

322.1(j) A statement of whether the particular services provided to the child should be provided in a classroom setting, in a small group, or on an individual basis.

322.1(k) A statement recommending the daily duration of the child's program.

322.1(l) A statement recommending the number of days per year on which the child's program should be provided, with justification if the number differs from the number of days in the regular school year.

322.1(m) A statement of the child's transportation needs, in accordance with the provisions of Chapter 9.

322.1(n) The criteria for the child's movement to the next less restrictive prototype.

**603 Code of Massachusetts Regulations, Section 28, Paragraph 504.4(b) (1979):**

504.4 *Placement assistance and program provision.*

504.4(b) If the Administrator of Special Education, with the assistance of the Division, cannot locate any program that can provide all elements of the child's IEP, the school committee shall request assistance from the Division in obtaining money with which to establish a program. If no such program can be located, the school committee shall, with or without outside financial assistance, establish such a program itself or through a collaborative.

**603 Code of Massachusetts Regulations, Section 28, Paragraphs 700.0-700.4 (1979):**

700.0 ***Provision of special education by the Division through its Bureau of Institutional Schools to resident children in institutions under the control of the Departments of Mental Health, Public Health, and Youth Services.***

The Division, through its Bureau of Institutional Schools, shall provide or arrange for the provision of special education to children in need of special education who reside in institutions under the control of the Departments of Mental Health, Public Health, and Youth Services, as defined in ¶ 108.0 of these regulations. Residential and medical services for such children that have not been recommended by the TEAM in accordance with ¶ 503.1, shall be provided by the state agency that controls the institution. The duties of the Bureau of Institutional Schools in providing special education to such children shall include:

700.1 Administering and monitoring the use of state and federal funds allocated for special education for resident children in institutions under the control of the Departments of Mental Health, Public Health, and Youth Services.

700.2 Determining the method, from the options described below, for the provision of special education to each resident child under the jurisdiction of the Bureau of Institutional Schools. Such method shall be determined in consultation with the TEAM and the Administrator of Special Education of the school committee with jurisdiction over such child (under ¶ 202.1(c) ) of these regula-

tions), and the appropriate manager of institutional programs, and may utilize one or more of the following, as determined by the Bureau of Institutional Schools:

700.2(a) Staff assigned to the institution.

700.2(b) A collaborative approved by the Department of Education.

700.2(c) A public school, a Division-approved private school, a private agency, or a state or other public agency.

700.3 Insuring that special education staff providing services to resident children under the jurisdiction of the Bureau of Institutional Schools meet the requirements for certification as determined by applicable state and federal regulations.

700.4 Monitoring the overall efficiency and quality of the special education component of the programs for children in institutions under the control of the Departments of Mental Health, Public Health, and Youth Services.

**603 Code of Massachusetts Regulations, Section 28, Paragraphs 802.0 - 802.19 (1979):**

802.0 *Application for approval: Required information.* Each school seeking approval by the Regional Review Board shall submit in writing information required by the Division on the following:

802.1 Whether previous application for approval has been made and the action taken on it.

802.2 The physical plant of the school, including any adaptations made to accommodate children in need of special education.

802.3 Certifications of inspections issued by state agencies and the local fire inspector, and a copy of the approval by the local school committee under G.L. c. 76, s. 1.

802.4 Professional personnel with a specific statement of the qualifications of such personnel to provide for the special needs of the particular population normally served or to be served by such school. As of September 1, 1979, all newly hired professional staff must meet the approval requirements under Chapter 10. Private schools may be exempted by the Division of Special Education for any one school year from this requirement to employ certified or approved personnel when compliance therewith would, in the opinion of the Division, constitute a great hardship in securing teachers.

802.5 Instructional equipment.

802.6 Library, including facilities or holdings particularly appropriate for children in need of special education.

802.7 Enrollment.

802.8 Provisions made for medical, nursing, and infirmary care of students.

802.9 Legal status, including a statement of whether or not the school is incorporated, copies of articles of incorporation, by-laws, if any, and a statement of any tax-exempt status.

802.10 Requirements for admission.

802.11 Any certification and licensing the school has obtained.

802.12 A copy of all catalogs of the school.

802.13 Rates for all children in need of special education.

802.14 A statement that the school does not discriminate on the ground of race, color, religion, or national origin and that it does not discriminate against qualified handicapped persons.

802.15 A statement that parents and students have the same rights regarding access to, amendment of, and dissemination to third parties of student records maintained by the school as are provided with regard to public school student records by the Massachusetts Student Record Regulations; and that authorized school personnel from the responsible school system have the same right of access to those records as is provided by those regulations with regard to public school student records.

802.16 Liaison procedures for providing quarterly progress reports and annual reviews to the Administrator of Special Education of the sending school committees of children enrolled in the school.

802.17 School policies regarding suspensions, expulsion, runaways, and treatment of students with reference to experimentation, restraint, exclusion, behavior modification, and administration of drugs.

802.18 Evidence of financial solvency.

802.19 Any other information the Division may require under its guidelines for approval of private schools, or policy statements and directives issued by the Division in furtherance of this Chapter.

**603 Code of Massachusetts Regulations, Section 28, Paragraphs 1000.0-1000.6 (1979):**

1000.0 *Approval of certain personnel.*

From the effective date of these regulations, approvals of the following personnel will be issued by the Department of Education, in accordance with the Regulations for Approval of Professional Personnel for Special Education adopted by the Board of Education:

1000.1 Generic Special Teacher of School Age Children with Mild Special Needs.

1000.2 Administrator of Special Education.

1000.3 Teacher of School Age Children with Moderate Special Needs.

1000.4 Teacher of School Age Children with Sensory Handicaps.

1000.4(a) Vision

1000.4(b) Audition

1000.5 Instructor of School Age Children with Severe Special Needs.

1000.6 Any other approvals or certifications that may be issued in accordance with regulations adopted by the Board of Education.